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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 223

SAMUEL JOSEPH RUGENDORF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certriorari to the United States Court of Appeals for the Seventh Circuit

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Brief for Petitioner

A. REFERENCE TO REPORTS.

The opinion of the Court of Appeals is reported at 316 F. 2d 589. The trial court did not render a formal opinion, and its decision is unreported.

B. JURISDICTION.

The jurisdiction of this court is invoked under Title 28, U.S.C., Section 1254(1). The judgment of the Court of Appeals was entered on April 30, 1963. A petition for rehearing was timely filed and there denied on May 24, 1963. The petition for writ of certiorari was filed in this court on June 21, 1963 and certiorari was granted on October 24, 1963.

C. STATUTES INVOLVED.

Title 18, U.S. Code, Section 2315 provides in relevant part:

> "Whoever receives, conceals, stores, barters, sells or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more * * * moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken * * *
>
> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

D. QUESTIONS PRESENTED FOR REVIEW.

1.

In a criminal prosecution, where the sole evidence tending to connect a defendant with the unlawful concealment of stolen merchandise consists in the finding of that merchandise on premises partially occupied by him, but to which a number of others also had access; and where the merchandise is seized pursuant to a search warrant issued on information provided by an unnamed confidential informant who told a federal officer that he saw said merchandise on said premises; and where defendant denies all knowledge of the presence of the merchandise on those premises; then,

May disclosure of the identity of the informer, or other facts concerning his activities, be compelled only if the informer is first proven to have been a moving party in the commission of the crime?

2.

Does the so-called "informer's privilege" against disclosure, extend to any matter not related to the identity of the informer?

If so, what is the limit of the reach of the privilege? And does the privilege ever authorize the withholding from the defense of facts which might tend to establish innocence?

3.

May disclosure of facts relating to an informant be withheld in all proceedings wherein a defendant seeks to invalidate a search warrant obtained on information supplied by that informant, simply by reason of the nature of the proceedings and without regard to any other consideration?

4.

Where a defendant has never before been arrested or charged with a crime; and where the defendant makes a strong and uncontested showing of previous good character and reputation; and where police testimony establishes without contradiction that the defendant is not known to be engaged in any form of criminal activity; then,

May disclosure of the identity of an informant be withheld because of the prosecutor's unexplained and unsupported assertion that such disclosure "might and probably would" result in the informant's death?

5.

May a conviction on a charge of receiving stolen property in violation of Title 28 U.S.C. Section 2315, be predicated entirely upon proof that stolen property was found on premises partially occupied and partially owned by defendant, but to which a number of others also had access?

E. STATEMENT OF THE CASE.

Following a jury trial held in the District Court for the Northern District of Illinois, petitioner was convicted on an indictment charging the unlawful receipt and concealment of 81 stolen furs of a value exceeding $5,000 which had been transported in interstate commerce, in violation of 18 U.S.C. 2315 (R. 1). He was sentenced to the statutory maximum of ten years with a recommendation that he become eligible for parole after serving two years (R. 12). The conviction was affirmed by the Court of Appeals for the Seventh Circuit, 316 F. 2d 589. This court granted a petition for certiorari, which petition questioned the sufficiency of the evidence and the propriety of the denial to petitioner of information relating to the confidential informant upon whose revelations the prosecution was based.

Petitioner and his wife own and occupy a single family dwelling in Chicago, Illinois. In the basement of the residence was a recreation room, one wall of which contained three doors leading to separate closets (R. 20-31).

On February 17, 1962, petitioner and his wife left Chicago for a vacation. They returned on March 4, 1962. During their absence, petitioner's brother Leo Rugendorf, his sister, his son, and one Roskin, a neighbor, all had keys to petitioner's home for any necessary emergency entrance, service, mail removal or similar purpose. (R. 30, 39.)

On his return from his vacation, petitioner resumed his business activity. He operated a grocery 19 miles from his residence. It was his practice to arise about 5:30 in the morning, spend the entire day in his store, and return to his home about 8:30 P.M (R. 32, 39-40).

Both petitioner and his wife later testified that at no time between their return from their vacation on March 4 and the petitioner's arrest on March 22, did petitioner have occasion to enter the closets in the basement. Petitioner's wife, during that period, entered one of the closets in which certain foodstuffs were stored, but did not enter the closet in which were found the furs here in question (R. 31, 32, 40).

On March 22, 1962, an affidavit was filed by an F.B.I. agent before the United States Commissioner in support of an application for a warrant authorizing the search of the basement of petitioner's residence (R. 6-8). This affidavit recited:

(1) That an FBI agent in Alabama told affiant of an Alabama burglary on February 10, 1962, involving fur capes and stoles (R. 6-7).

(2) That an unnamed previously reliable informant relayed information to affiant, through another agent, that one Schweihs committed the Alabama burglary (R. 7).

(3) That police officer Kelleher told another agent, McCormick, that on March 1, 1962, he saw Schweihs at Rugendorf Bros. Meat Market, managed by petitioner (R. 7).

(4) That another unnamed previously reliable informant told another agent that petitioner's brother, Leo Rugendorf, was a fence, and that Leo and defendant Sam were associated in the meat business (R. 7).

(5) That, yet another previously reliable informant told another agent who told affiant that Schweihs and others were burglars who disposed of stolen goods through Leo Rugendorf (R. 8).

(6) That on March 16, 1962, a fourth unnamed but reliable informer told affiant that he had seen 80 fur garments in petitioner's basement "within the past week," describing them as mink, otter and beaver jackets, with labels removed (R. 8).

(7) That the same informant told affiant that he, the informant, "had been told" the furs were stolen (R. 8).

(8) That descriptions of all furs stolen in the United States valued in excess of $5,000.00 are reported to the FBI (R. 8).

(9) The affiant reviewed FBI files and the only burglary in the preceding six months involving furs similar to those described by the confidential informant, had occurred on February 10 in Alabama (R. 8).

Based upon this affidavit, a search warrant was issued (R. 4-5) and served on petitioner's wife at the residence (R. 5). (Petitioner, at the time, was at his place of business, R. 29.) 82 furs were found in the basement closet. Petitioner's wife expressed surprise, identified one of the furs as her own, and surrendered the remainder to the officers (R. 16).[1]

The agents carried away the furs in three white bags which they found in the basement, one of which was a laundry bag in active use and bearing petitioner's name (R. 42). Mrs. Rugendorf emptied the laundry from the

[1] At the trial, Mrs. Rugendorf testified that she had told the agent that this fur was hers "automatically" because it had been in her house for a couple of years, but that it really belonged to her sister-in-law (R. 36).

bag in order that the agents might use it to carry away the furs (R. 16).[2]

Petitioner was thereupon arrested. He denied all knowledge and complicity, but suggested to the arresting agents that it was possible that his brother Leo might be responsible for the presence of the stolen furs in petitioner's basement without his knowledge (R. 40-45, 64).

Shortly thereafter, petitioner was indicted (R. 1). In advance of trial, the petitioner moved to suppress the furs seized in his basement, alleging as grounds that the allegations of the application for search warrant were untrue, and that the affidavit was legally insufficient to support the issuance of a search warrant (R. 2). The trial judge ruled that the affidavit was legally sufficient (R. 15). The evidentiary hearing of the motion to suppress was held during the course of the subsequent trial (R. 17).

At the commencement of the trial, the defense requested the names of the confidential informants described in the application for the search warrant. In support of this request, defense counsel stated that the identity was necessary to the defense because the informant, as a witness, would necessarily demonstrate that the defendant had nothing to do with the crime. He further suggested that even the government should be interested in calling the informant as a witness since the informant obviously would have some knowledge as to whether the defendant was guilty (R. 14). The government objected to this request, stating, "... that if the government is to reveal the name

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[2] Mrs. Rugendorf testified that the other bags were found in the closet with the furs (R. 36). The agent testified that they had been found in a corner of the basement recreation room (R. 62).

of any informants they might and probably would be killed." (R. 15). The trial court denied the defense request (R. 15).

The case for the prosecution consisted, in its entirety, of: (1) the testimony of an FBI Agent that he executed the contested search warrant at petitioner's home and there seized 81 furs (R. 15-16); and

(2) a stipulation that the furs thus seized had been stolen in two separate thefts in Louisiana and Alabama and were valued in excess of $5,000 (R. 15).

The government thereupon offered the furs into evidence, and a hearing was held outside the presence of the jury on the evidentiary aspects of petitioner's motion to suppress. The motion had alleged, and defense counsel verbally reiterated that the search warrant application was untrue. (R. 2, 13, 14).

The hearing commenced with the testimony of police officer Kelleher that he had not told the agent that the Rugendorf Meat Market was managed by Sam Rugendorf (R. 17), contrary to the allegations of the affidavit (R. 7). Petitioner testified that he was engaged in the grocery and meat business several miles from the Rugendorf Bros. Meat Market, with which he had no connection whatever since 1952. He had not been at the Rugendorf Bros. Meat Market for the past eight years (R. 19).

An employee of Rugendorf Bros. Meat Market who had worked there for four years stated that he had never seen defendant at that place of business (R. 21). Another witness, the manager of Rugendorf Bros. Meat Market since 1948, also testified that the defendant had no connection with that business (R. 21).

All of the foregoing defense evidence was uncontradicted.[3]

As his next witness on the hearing of the motion, petitioner called FBI Agent Moore, who testified that he was the agent in charge of the case and that he had had a conversation with the confidential informant. He was then asked: "Where did you have this conversation with this confidential informant?" The prosecution objected, stating that the government could not reveal the name of the informant "because it would cause a possible murder." The objection was sustained (R. 22).

Successive objections, assigning the same reason, were sustained to each of the following questions:

"What is the name of this man?"

"Where is he now?"

"On what day did he say he saw the furs in the basement of the home of Sam Rugendorf?" (R. 22).

The defense argued that the affidavit's recital that on March 16, the informant said that he had seen the furs "within the past week," left a substantial period of time during which the defendant's whereabouts would have to be accounted for. The defense sought to narrow that area of proof, and contended that the information was necessary to petitioner's defense (R. 23).

The defense further argued that the search warrant affidavit had been proved to be false in two particulars, and that it was proposed to demonstrate, by the questions ob-

[3] The agent who first arrested petitioner testified that he was unable to find him at the Rugendorf Meat Market. Instead, petitioner was apprehended at his grocery store, several miles away. (R. 29, 65-66).

jected to, still further falsity. The court, however, expressly foreclosed any further questioning of the witness Moore (R. 24), denied the motion to quash the warrant and suppress the evidence, and admitted the furs into evidence, ruling:

> "Even if part of the affidavit should be false, the main part of it, the material part, is true, because they actually found the garments there. Bring the jury." (R. 25).

The exhibits were received into evidence, and the government rested. A defense motion for acquittal was denied.

The defense introduced evidence, not contested or rebutted, showing petitioner's good reputation (R. 26-30), his absence from Chicago in February and March of 1962, and the holding during that period of keys to his residence by his brother Leo and others.[4] (R. 30, 37).

Defendant and his wife both testified, denying any knowledge of the presence of the furs in their home and of any transaction relating thereto (R. 30-34 and 37-45). They both testified that the raiding (R. 33) and arresting (R. 42-44) agents had suggested that Leo was responsible for the presence of the furs in their home. On rebuttal, the principal agents admitted that there had been a discussion concerning Leo with Mrs. Rugendorf at the time of the raid (R. 62) and with petitioner at his arrest (R. 64), but stated, that petitioner and his wife had made the suggestions con-

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[4] Petitioner testified that Leo had never returned the residence key which had been given him when petitioner left on vacation (R. 39). One of the arresting agents testified on rebuttal that petitioner told him that Leo had returned the residence key (R. 64).

cerning Leo. One agent further corroborated petitioner's testimony that while under arrest, and in the presence of the agents, he had telephoned Leo's home. The petitioner testified that he had done this at the direction of the arresting officers (R. 42-44); but the agent testified that the call had been made at petitioner's request (R. 64).[5]

Motions for directed verdict of acquittal made at the close of the prosecution case (R. 25) and at the close of all of the evidence (R. 66) were denied. The jury found the defendant guilty as charged in the indictment.

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[5] Petitioner also testified that while under interrogation, he had offered "to take a lie detector test and I'll pay for it myself." On cross-examination, he repeated the offer. (R. 47) The prosecutor asked if he were willing to take such a test "right now", (R. 49) and petitioner and his attorney agreed. It was stipulated that the results be submitted to the jury. (R. 50) With the approval of the court, an examiner was agreed upon. (R. 56) Subsequently, however, the trial judge changed his mind. He stated that a highly emotional person might show false indicia of guilt, and that a "very cool and collected" person might conceal reactions indicating guilt, and refused to permit the test to proceed. (R. 58) All these events occurred in the presence of the jury. Subsequently, a government agent denied that Petitioner had offered to take such a test while under interrogation. (R. 65)

SUMMARY OF ARGUMENT.

1. The "informer's privilege" is susceptible of grave abuse. A refusal to require reasonable disclosure, imperils freedom of speech and press, security from unreasonable search and seizure, freedom of association, the right to counsel, and other fundamental elements of liberty.

2. In view of its materiality to his defense, the petitioner was wrongly denied information concerning the informant whose disclosures generated the search of his home. Because he was denied all information concerning the informants, he was necessarily unable to prove that they were moving parties in the crime; but this last is completely irrelevant to his legal entitlement to the disclosures he sought. It is also quite immaterial that a search warrant is involved in this case, for a defendant has as much right to such information in support of an effort to suppress evidence as he has in any other type of proceeding. Any other rule will make the policeman the sole effective judge of the existence of probable cause. The contention that the requested disclosures might result in a murder was not a proper ground for invoking the privilege, because the information sought was highly relevant to the defense and because there is no apparent basis for the apprehension thus expressed.

3. The evidence seized under the authority of the contested search warrant, should properly have been suppressed. The affidavit supporting the application for the search warrant was legally insufficient, because not one fact therein recited was known to the affiant, and there was no apparent basis for believing the information received

from the informant. The petitioner proved beyond question that the affidavit was false in relevant part, and was therefore entitled to suppression of the evidence resulting from that affidavit. At the very least, he was entitled to a full hearing on the issue of probable cause, with all necessary disclosures concerning the informant. It is completely immaterial that incriminating evidence was in fact found at his home; a search cannot be justified by its results. Disclosures were unreasonably withheld from petitioner, even when there was no possible danger of compromise of the identity of the informant. The government's refusal to permit defense inquiries on the issue of probable cause, is itself sufficient to require suppression of the evidence whose seizure is thus questioned.

4. Even with the questioned evidence considered, there was insufficient proof of guilt. The most that can be said to have been proved against Petitioner, is his constructive possession of stolen property. But there is no evidence that he knowingly possessed the stolen goods, and knowledge of their stolen character may not properly be inferred from constructive possession alone.

ARGUMENT.

I.

TO PERMIT THE PROSECUTION TO TAKE REFUGE BEHIND AN INFORMER OF UNDISCLOSED IDENTITY IMPERILS ALL THE BASIC CIVIL LIBERTIES.

The unnamed confidential informant presents to society, problems potentially of much greater seriousness than those confronting the individual defendants who stand accused by him.

No concern which this court may express for the preservation of basic civil liberties, can viably survive the protection which is given to the confidential informant. The case at bar, aggravated as it is, is not atypical of the operation of the "informer privilege" in federal criminal jurisprudence. It may readily be demonstrated that there are few basic rights which will endure the acceptance of practices of this nature.

For example, this court has recognized the vulnerability of the freedoms of speech and press to abuse of the power of search and seizure. The historic struggle between the power of search and the quest for freedom of expression was discussed in *Marcus* v. *Property Search Warrant*, 367 U.S. 717, 724-729, 6 L.Ed. 2d 1127, 1132-1135. The statute there considered was found to vest in police officers an improper discretion as to what might be seized. But can it be doubted that the same police end may readily be served through the device of the confidential informant, of whose reliability the policeman is the sole and absolute judge?

This court has likewise uniformly granted protection against the introduction of wiretap evidence, where that issue was presented squarely. Yet, it has been judicially recognized that the term "confidential informant" is "a frequent euphemism for a 'wire tapper' ". *United States* v. *Coplon*, 185 F. 2d 629, 639, 2 Cir., 1950. If the policeman frankly states that his information was obtained through wire tap, the resultant evidence is excluded. But information received through a "confidential informant" is considered a proper basis for a search, although the court may not know whether the "confidential informant" may be the policeman at the next desk with whom wire tap confidences are interchanged with the policeman present in court. For what, in the mind of a policeman, could be an informant of greater past proven reliability, than a fellow officer whose evidence stems from the defendant himself in a telephone conversation with his attorney?

This court has treated the surreptitiously installed and intruding microphone as a violation of rights granted by the Fourth Amendment. *Silverman* v. *United States*, 365 U.S. 505, 5 L.Ed. 2d 2734. Can it be doubted that the procedures there described are equally noxious if the microphone is installed and used by a "confidential informant of past proven reliability" on the basis of whose disclosures a policeman obtains a search warrant?

This court has been steadfast in enforcing the protection against unlawful search and seizure granted by the Fourth Amendment. *Wong Sun* v. *United States*, 371 U.S. 471, 9 L.Ed. 2d 44. It has also protected the citizens against comparable constitutional deprivations by state officials, taking an extremely realistic view of the temptations presented to "federal officers being human." *Mapp* v. *Ohio*, 367 U.S. 643, 657-660; 6 L.Ed. 2d 1081, 1091-1093. Yet, it is clear that had the agents in *Wong Sun* chosen to

treat the confessing accomplice as a "confidential informant of past proven reliability", by regarding his confession of his own guilt as reliable and as "past" by ninety seconds at the time of the succeeding expression inculpating Wong Sun, the conviction may well have been sustained. A similar procedure could obviously have been followed in the *Mapp* case. In its fundamentals, "the ignoble shortcut to conviction" (*Mapp*, 367 U.S. 660, 6 L.ed. 2d 1093) is still "left open", and strongly "tends to destroy the entire system of constitutional restraints on which the liberties of the people rest."

In the realm of liberties more prosaically accepted, but no less zealously guarded, the confidential informant is free to stride forth as a destructive colossus. This court has protected the freedom of association from unwarranted incursion through the seizure of membership lists (*Bates* v. *City of Little Rock*, 361 U.S. 516, 4 L.Ed. 2d 480; *Louisiana, ex rel. Gremillion* v. *NAACP*, 366 U.S. 293, 6 L.Ed. 2d 301) and has taken a highly practical view of the deterent to free association implicit in compulsory disclosure and its direct relationship to freedom of speech. (*Shelton* v. *Tucker*, 364 U.S. 479, 486, 5 L.Ed. 2d 231, 236). Yet, a police officer would have to be more than human to treat as suspect information from whatever source, that a crime is being committed on the premises of an organization whose aims and purposes, while constitutionally legitimate, are anathema to him. The temptation to inspect membership lists in the course of his search, would probably be irresistible.

Similarly, the anonymous pamphleteer whose historic contribution was recognized in *Talley* v. *California*, 362 U.S. 60, 64-65, 4 L.Ed. 2d 559, 563, is at the mercy of the confidential informant who has, or claims to have information which would justify a search of his press facilities.

The right to counsel, protected by this court from all encroachment (*Gideon* v. *Wainright*, 372 U.S. 335, 9 L.Ed. 2d 799; *Ferguson* v. *Georgia*, 365 U.S. 570, 5 L.Ed. 2d 783; *Hamilton* v. *Alabama*, 368 U.S. 52, 7 L.Ed. 2d 114) is ephemeral indeed if confidential communications with that counsel eventuate in information, however acquired, in the hands of a "confidential informant", whose identity is protected even while he generates search and arrest warrants. Yet, the telephone of an attorney is no more immune than any other to the art of the wire tapper, who may thereby advance his status as a confidential informant on a wholesale basis.

The inherent vice in the concealment of the identity of the confidential informant, is that it enables the police officer to serve as the sole judge of the propriety of his own activities, of the "reliability" of his confidential informant, and of the necessity of protecting that identity against meaningful judicial scrutiny.

The compelling necessity for such scrutiny is shown by the facts disclosed in *United States* v. *Pearce*, 275 F. 2d 318, 7 Cir., 1961. There, the agent slavishly followed the established routine description of the informant as one of established reliability, although the informant had never made a previous disclosure. The facts strongly suggest that the agent there withheld the informant's identity in order to conceal a lack of probable cause, and not in furtherance of any legitimate investigative objective.

We urge to your Honors that no more appropriate area could be found for the exercise of this court's power " . . . to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217, 4 L.Ed. 2d 1669, 1677.

If petitioner was properly denied information concerning the informant who accused him, it is hard to imagine any circumstance under which any future defendant may be deemed entitled to such disclosure. We believe the case at bar presents squarely to your Honors, the determination of the minimum standards for a defendant's entitlement to such information.

II.

THE PETITIONER WAS WRONGLY DENIED INFORMATION CONCERNING THE CONFIDENTIAL INFORMANTS.

According to the government's affidavit, this prosecution ensued consequent upon information received from certain confidential informants.

The jury's verdict is necessarily the product of speculation as to what those informants might have said, if called as witnesses.

The informants certainly possessed information highly relevant to the case. Very probably, they knew all its ultimate facts. But they were not called as witnesses, because the government refused to say who they were. It refused even to say when they gave their information.

And so we will never really know, with certainty, whether the defendant is in fact guilty, or completely innocent. We will never even know whether the evidence against him was lawfully obtained.

Only the informants know these things. And they were not permitted to speak.

Against this somber background, we approach the legal issues presented by the case.

A. IMPROPER LIMITATIONS HAVE BEEN IMPOSED ON THE RIGHT OF THE PETITIONER TO OBTAIN INFORMATION CONCERNING THE INFORMANT.

The most recent definitive expression by your Honors on the issue of the right of a criminal defendant to learn the identity of an informant, was made in *Roviaro* v. *United States*, 363 U.S. 53, 1 L.ed. 2d 639. In *Roviaro*, it was made clear that the so-called informer's privilege must give way "where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause . . . " 353 U.S. 60-61, 1 L.ed. 2d 645.

This holding has generated a flurry of inventive activity in a search for mechanistic slogans designed to circumvent the effect of that decision.

In *Roviaro*, the informant helped to set up the commission of the crime and was present at its occurrence. Because of this, it has frequently been asserted that a defendant cannot obtain information relating to an informant unless the informant is first shown to have planned and participated in the crime.

Likewise, in *Roviaro*, no search warrant was involved. Because of this fact, it has also been held that the informant privilege is unassailable where the information is sought by a defendant in aid of his attempt to suppress evidence or to quash a search warrant.

Concededly, those were the facts in *Roviaro*. But we hope that your Honors will agree that those facts do not delimit the principles of *Roviaro*. Both of those arguments—the supposed non-participation by the informant,

and the fact that a search warrant was issued—have been used by the Court of Appeals below as grounds for the denial of the defendant's request (R. 73). We submit neither reason is valid.

1. The test of informant's participation in the offense is improperly applied.

It is obvious that the extent of a defendant's knowledge of the facts of a criminal case, will generally be proportionate to the degree of his personal involvement.

Accordingly, if it be a condition of a defendant's right to information concerning an informant, that he first show the informant was a participant in the crime, it seems clear that the greater a defendant's entanglement in the crime, the more successful he will be in making such proof.

And where, as here, a defendant denies all knowledge of the crime, he is faced with a literally impossible task in attempting to show that the informant was a party to the offense.

Quite obviously, a defendant who is truly innocent and who is denied all knowledge concerning an informant, could not possibly show that the informant was a party to the crime.

But that is certainly no basis for a finding, such as that implicit in the Court of Appeals' opinion here reviewed, that the informant in fact did not participate in the crime.

The government affidavit states that the informant saw the furs in the basement of petitioner's home and was told that they were stolen. Certainly, he was not a mere passer-by. Assuming that he was not a trespasser, he must necessarily have obtained his information with the acquiescence of the guilty parties. The attitude of those parties toward

the petitioner and his residence would in itself have resolved all the issues of this case. Did the petitioner admit him and show him the furs? If so, the petitioner is almost certainly guilty. Was the informant admitted by an unauthorized key during the temporary absence of petitioner and his wife, and warned to leave not even a cigarette as a trace of his presence. If so, the petitioner is almost certainly innocent.

But even aside from this, the government affidavit fairly shouts the intelligence that the informer knows not only who stole the furs, but who put them in petitioner's basement. He knows beyond question whether petitioner is innocent or guilty. And for that reason, petitioner desparately sought to examine the informant.

The Petitioner was denied that right because, lacking the information he sought, he was necessarily unable to prove that the informant was a guilty party who "*helped set up the commission of the crime and . . . was present at its occurrence*" (emphasis copied, R. 73). This is not only illogical, but supremely unjust.

On that premise, a defendant may be denied the right to examine an informant, even though that informant was an eye witness to the crime and knows the defendant to be innocent, if the informant came by his knowledge innocently. The very statement of the proposition is shocking.

Even if the informant's participation was in fact criminal, he must *both* help set up the crime and be present at its occurrence. Direct participation in the crime itself, with the resulting certain knowledge whether defendant is innocent, would not expose an informer to the defendant unless the informer also helped to set up the crime. There is simply no reasonable basis for such a rule, and certainly this Court has never even by intimation rendered any such holding.

Yet, this misconception of the reach of *Roviaro* has gained wide currency. The test has been applied (albeit on different facts) in *Jones* v. *United States*, 271 F. 2d 494, 496, C.A.D.C., 1959; in *Miller* v. *United States*, 273 F. 2d 279, 281, C.A. 5, 1960; in *Pegram* v. *United States*, 267 F. 2d 781, 782, 6 Cir., 1959; in *United States* v. *Whiting*, 311 F. 2d 191, 196, 4 Cir., 1962; as well as in the case at bar.

This "rule", if such it be (and certainly the petitioner has heretofore felt its full impact) has no possible basis in law or in logic. The question before a trial court relates to the guilt or innocence of the defendant, and not that of the informer. The right to compel the testimony of a witness is not affected by complicity, or lack thereof, on the part of that witness. *Piemonte* v. *United States*, 367 U.S. 556, 559, 6 L.Ed. 2d 1028, 1031, footnote 2.

The only possible relevant inquiry is whether there is reasonable ground to believe that the identity of the informant might be helpful to a legitimate defense effort. Where information concerning an informant "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Roviaro*, 353 U.S. 61, 1 L.Ed. 2d 645. This is no more and no less true, whether or not the informer be himself a criminal.

2. The fact that the proceeding involved a search warrant is immaterial.

In the case before your Honors, defense counsel told the trial court that if the informant "takes the stand it will demonstrate that Sam Rugendorf had nothing to do with it . . ." (R. 14). He further stated that in view of the scope of the informer's knowledge, the government should be interested in calling him to the stand if the petitioner were truly guilty (R. 14).

Defense trial counsel contended that he was entitled to learn the identity of the informants "if the names of the informants are necessary to a proper defense or a proper presentation of the defendant's case in attacking the search warrant." (R. 75).

The trial court denied the request (R. 15).

The Court of Appeals upheld this refusal, in part on the authority of *United States* v. *Whiting*, 311 F. 2d 191, 196, 4 Cir. 1962, wherein it was held that the names of the informers need not be divulged where the information is "wanted in support of the effort to invalidate the search warrant and not to help the defendants in the presentation of their case." (R. 74).

If this were in fact the law, it would have no application in the case at bar. The petitioner demonstrated on a number of occasions that the name of the informer was needed in furtherance of his substantive defense (R. 13, 14, 23, 24, 75).

But this "rule" (presently applied, so far as we know, only in the Fourth and Seventh Circuits) has no apparent basis. Simply stated, it would mean that a defendant is entitled to know the identity of an informant only where, in addition to other qualifications, he can show that such information would help him to prove the substantive fact of his innocence. He cannot, however, obtain this information where its only effect would be to enable him to assert a fundamental constitutional right.

This is fearful doctrine indeed. Basic liberties are preserved only by a concern for procedural safeguards. Approval of the *Whiting* doctrine would badly downgrade a procedural safeguard of explicit constitutional dimensions.

If information derived from an informant is to be probable cause for a search warrant, and if the identity of the informant is to be privileged in all proceedings attacking a search warrant, then there can never be any true determination of probable cause save in the mind of the policeman. As was held in *Costello* v. *United States*, 298 F. 2d 99, 102, 9 Cir., 1962,

> "A reasonable opportunity for the appellant to challenge the reliability of the informant must be permitted on the motion to suppress, *or no real judicial check would ever take place.* The refusal of the trial court, upon appellant's request, to require disclosures of the name of the informant under these circumstances was error." (Emphasis added.)

The *Whiting* rule, as adopted by the Seventh Circuit in the case at bar, draws a completely artificial distinction between the fact of substantive innocence, and the procedural safeguards provided by the Constitution. The case at bar would make the police officer the sole and final arbiter of the issue of probable cause in all search warrant cases based on the supposed tip of an informer. The rule would somehow grant to him who would assert in the courts a basic constitutional right, a lesser status before the law than is given to him who would show the fact of his nonparticipation. The rule is mischievous, dangerous, and irrational. Your Honors have recognized that protection against unlawful search and seizure is inextricably interwoven with other constitutional freedoms. *Marcus* v. *Property Search Warrants*, 367 U.S. 717, 724, 6 L. Ed. 2d 1127, 1132. The *Whiting* rule would not only impair those freedoms, but would cast opprobrium upon him who would assert them.

B. NO VALID GROUNDS WERE ASSERTED FOR DENIAL TO THE DEFENSE OF INFORMATION CONCERNING THE INFORMANT.

The prosecutor at the trial, to his credit, did not contend that the identity of the informant was immaterial to the issue of the case. While this argument was made and apparently accepted on appeal, it is beyond legitimate argument that the informant must necessarily have possessed knowledge which would be highly relevant to the determination of petitioner's innocence or guilt.

Further to his credit, the prosecution did not contend at the trial that the attack upon the search warrant was itself sufficient to deprive the petitioner of entitlement to this information. And certainly, he did not even intimate that the informer had no connection with the crime. While these propositions form the basis of the Court of Appeals' opinion, they were not urged in the trial court.

The sole basis urged at the trial for the denial of this information to the defense was "that if the government is to reveal the name of any informants they might and probably would be killed." (R. 22).

In suggesting that such disclosure "would cause a possible murder" (R. 22), the prosecutor was saying nothing more than might be said in any informant case. The theoretical possibility of murder as retribution for unfavorable testimony probably exists in any case, civil or criminal, regardless who the parties may be.

Yet, we question whether criminal jurisprudence may, with constitutional propriety, be geared to such possibilities. Must not some deference be shown to the forces mobilized by organized society to prevent violence? If criminal defendants are to be denied fundamental rights on the theory that innocent people might otherwise suffer,

has not violence been done to the presumption of innocence which attaches to the defendant himself? If the government is to be permitted to withhold a relevant witness on the ground that he might be murdered, may not any private citizen, with even greater propriety, properly refuse to participate in any judicial proceeding on exactly the same grounds?

The government's expressed concern for the safety of persons exposed as witnesses would be more tenable if it were less selective. In fact, the government very probably extends no special deference to any person whose testimony it seeks to compel, and who expresses unwillingness to testify because of possible retribution. In *Piemonte* v. *United States*, 367 U.S. 556, 559, 6 L. Ed. 2d 1028, 1031-1032, your Honors considered the contempt conviction of an individual who refused to testify on precisely the grounds relied upon by the prosecutor in the trial court here. Observing that fear of underworld retaliation did not mitigate the refusal to testify, your Honors held,

> "Nor would this be a legal excuse. Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law . . . The government of course has an obligation to protect its citizens from harm. But fear of reprisal offers an immunized prisoner no more dispensation from testifying than it does any innocent bystander without a record."

We are confident your Honors did not mean, by the quoted language, to say that fear of underworld retaliation confers no dispensation, only in the case of prosecution witnesses. The law, whose enforcement is the overriding consideration in such matters, presumes a defendant's innocence and grants him the right to compel exculpatory testimony, fully as forcefully as it provides for the in-

carceration of offenders. "Law enforcement" is a burden only partly shouldered by the policeman and the prosecutor; defense counsel play an equally significant role, concerned as they are with the enforcement of laws no less important to society than those "enforced" by the police.

A fear of underworld retribution either justifies the withholding of evidence, or it does not. In *Piemonte*, your Honors held that it did not. Any contrary presumption strikes at the whole warp and texture of our society. But if such a presumption is to be indulged, there would seem no more reason to apply it to witnesses sought by the prosecution, than to those sought by the defense.

The petitioner has never in his 55 years been suspected of any form of illegal activity (R. 30), much less of murder. His conduct had been exemplary, and his reputation excellent (R. 26-28). Those facts in no way affect the principle involved. But they lend an especial poignancy to the prosecutor's failure to assert that the petitioner might cause the "possible murder" which the prosecution purported to fear. And they are highly relevant to any evaluation of the bona fides of the prosecutor's contention.

If a "possible murder" be a sufficient ground for the prosecution's withholding of evidence in the case at bar, it is hard to imagine any case in which the same assertion would not serve equally well. And the effectiveness of the assertion upon the outcome of the litigation may, we feel, be determined not only from the adjudication of guilt, but as well by the imposition of a maximum sentence upon a defendant in advanced middle age with a previously spotless reputation.

C. THE COLLATERAL INFORMATION SOUGHT BY THE DEFENDANT WAS WRONGLY DENIED TO HIM.

1. The place of the informer's conversation with the agent was improperly withheld from the defense.

In the case at bar, the prosecution went so very far as to claim that to disclose the site of the informant's conversation with the policeman "would cause a possible murder" (R. 22). If the law were to recognize a presumption of future homicide, it would seem that its application to that defense question would impose an unnecessary strain. It would also seem at least equally probable that the answer to the question might disclose a trespass into defendant's basement by federal agents or individuals working on behalf of the agents.

Obviously, if the conversation took place in the defendant's basement, or in the immediate vicinity of the defendant's home, a strong basis would be generated for the belief that the prosecution evidence was the product of an unlawful search.

If, on the other hand, the conversation took place at the informant's home, productive inquiries could have ensued which would not in any way have compromised the informant's address.

And if the place where the conversation took place was utterly irrelevant, the prosecutor's objection cannot have been made in good faith.

It is impossible to imagine how any answer to that question (short of the informant's address, which the agent certainly would not have volunteered) could "cause", or even remotely contribute to "a possible murder".

The voicing of the objection to that question suggests strongly that the thought of a "possible murder" may have been somewhat euphemistic in other applications as well.

2. Denial of information as to the date on which the informant saw the furs, was clearly improper.

In its affidavit, the government stated that on March 16, 1962, an informant told the agent that he had seen the furs in petitioner's basement "within the past week". In the trial court's view, this meant that the informant did not say on what day he saw the furs (R. 23). If this were true, the agent would simply not have had the information with which to answer the defense question, so that a "possible murder" could not possibly have ensued.

But the affidavit does not say that the informant did not give the exact date. In fact, the intendments are to the contrary. And the government disavows any averments which the affidavit "does not compel". (Brief in Opposition to Certiorari, p. 11). If, as seems much more probable, the informant told the agent the date on which he saw the furs, a highly relevant area of possible defense evidence is generated. A whole week is involved. If it could be shown that the informant saw the furs at a time when petitioner and his wife were somewhere else, that fact would serve to create the clear inference that an unauthorized copy of the petitioner's house key was in the hands of the guilty parties (as is quite probable considering the number of persons who held such keys during petitioner's vacation). The showing of such furs by the thieves during petitioner's absence, would have been highly persuasive evidence that the thieves were interested in keeping petitioner from learning of the presence of the furs.

But petitioner was obviously unable to make this showing if he were told only that the informant saw the furs some time within a given week.

It is, of course, conceivable that the petitioner himself showed the furs to many possible informants, and that to learn the date would identify the informant. But certainly, the prosecution did not suggest any such possibility even in its affidavit, and this thought hardly rises to the dignity of a guess.

And in this connection, there must be borne in mind the strong possibility that *nobody* showed the furs to the informant. Instead, the informant may well have gained his access, and his inspection of the furs, without the permission or knowledge of the guilty parties *or* of the petitioner. In short, as previously observed, the informant's inspection of the furs may well have been the product of an unlawful search by or with the assistance of police authorities.

Certainly, if there is any reason why the petitioner should not have been allowed to attempt to show that he was not present when the informant saw the furs, that reason is not suggested within the record before your Honors.

If one may rely completely upon the prosecutor's sense of responsibility, he must presume that the suggestion of a "possible murder" was not a mere catch phrase, designed to elicit visceral indignation at the sacrifice of legal principles.

Very well, then. The informant "might . . . probably" (R. 15) become the victim of a "possible murder" (R. 22) if the court were told, even in general terms, where the informant talked to the agent, or the date on which he saw the furs in petitioner's basement (R. 22).

But from this fact, it simply does not follow that petitioner may be deprived of his liberty on evidence, the method of whose acquisition is left completely to conjecture, and which was seized on the basis of an affidavit which

was at least in part known to be untrue when filed. Nor does it follow that petitioner may be thus imprisoned without being given a reasonable opportunity to defend himself.

In short, the defendant also has rights. As was pointed out by Mr. Justice Clark in his dissent in *Roviaro*,

> "The government is fully aware of this dilemma and solves it every day by foregoing prosecutions in many cases where evidence essential to the defense would require disclosure [relating to an informant]. 353 U.S. 67, 1 L. ed. 2d 648.

It would appear that an even more effective solution to the dilemma has now occurred to the government. In this case, the prosecution has proceeded full tilt and "evidence essential to the defense" has been flatly withheld by way of preventing a "possible murder" that "might . . . probably" ensue.

III.

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE EVIDENCE SEIZED PURSUANT TO THE SEARCH WARRANT.

A. THE APPLICATION FOR SEARCH WARRANT WAS LEGALLY INADEQUATE.

The affidavit for search warrant recited that on a specified date, an unnamed, but previously reliable informant, told the affiant that he had seen 80 fur garments in petitioner's basement "within the past week".

It was also recited that the unnamed informant "had been told", by his own unnamed informant of conjectural reliability, that the furs had been stolen.

The foregoing are the only recitations within the affidavit which have the slightest relevance to the direct issue whether petitioner's basement should be searched.

There is nothing contained within the affidavit which would tend to afford any basis for crediting that hearsay. There is no suggestion that the unnamed informant's unnamed informant had ever previously been a source of information; and there was no apparent basis for crediting his averment.

While the affidavit did recite that the principal informant had "furnished reliable information in the past *to the Federal Bureau of Investigation*", (R. 8, Emphasis added), that averment would seem inferentially to negate the possibility that the affiant himself had ever before dealt with this informant. The F.B.I. is, after all, a very large agency with many diverse areas of interest totally unrelated to criminal matters. The basis for the affiant's belief that his informant had in the past furnished reliable information to the FBI, does not appear. If another agent told the affiant of his informant's reliability, the affiant need only have said so, since he made equivalent assertions in other portions of the affidavit with reference to other facts (R. 7, 8). If the agent learned of his informant's reliability through some other source, there is likewise no indication of reliability of that source.

The entire affidavit is based on hearsay, once and twice removed and relayed through an amorphous chain whose length cannot be determined.

It has, of course, been established that search warrants may be based in part on hearsay. Thus, in *United States* v. *Guido*, 251 F.2d 1, 7 Cir., 1958, it was held that affidavits supporting an application for search warrant might consist partly in hearsay, provided other matters appear of affiant's own knowledge. In *Jones* v. *United States*, 362 U.S. 257, 272, 4 L.Ed. 2d 697, 708 your Honors concluded

lingering doubts, holding that a warrant may be based in part on hearsay, "so long as there was a substantial basis for crediting the hearsay."

In *Jones,* the policeman affiant swore to information personally known to him. His affidavit stated that the persons whose premises were to be searched for narcotics had previously admitted their drug addiction to him. He had seen needle marks on their bodies. The informant's ". . . story was corroborated by other sources of information." 362 U.S. 271, 4 L.Ed. 2d 708.

Thus, in *Jones,* the facts satisfied the standards imposed by the court. The officer properly relied, ". . . upon information received through an informant, rather than upon his direct observations, . . . [because] the informant's statement [was] reasonably corroborated by other matters within the officer's knowledge." (*Jones,* 362 U.S. 257, 269, 4 L. Ed. 2d 697, 707.) Similarly in *Draper* v. *United States,* 358 U.S. 307, 313, 3 L. Ed. 2d 340, probable cause ensued where information from an informer was corroborated by information based upon personal observations made by an agent.

Contrast the situation in the instant case. The informant was not corroborated by other observations. He was "corroborated" by the agent's naked guess that the furs allegedly seen by the informant, but not by the agent guesser, were similar to those stolen in Alabama, which the affiant had likewise never seen.

In *Jones* v. *United States,* 362 U.S. 257, 4 L. 2d 697, 708, 725, the party to be searched was known by the police to be addicted to drugs. That fact, personally known to the officer affiant, rendered probable the notion that he might be likely to possess drugs as claimed by the con-

fidential informer. In this case, petitioner Sam Rugendorf was not known by the police, or by any agent of the FBI to have any personal characteristics which might render probable his commission of any offense whatever.

The desperate nature of the quest for corroboration, is shown by the affidavit's emphasis on petitioner's status as Leo's brother. We do not doubt that this fact provided a strong motivation for his being arrested and charged on evidence of the character at hand. However, his status as Leo's brother is utterly lacking in legal cogency. The Commissioner, in issuing the affidavit, was invited to hazard that petitioner, having made the perverse, deliberate biological choice of the same parents as Leo, had probably adopted similar moral standards as well. The novel concept of horizontal corruption of the blood, on which the officers predicated their application for a search warrant, achieved a factitious judicial acceptance through the issuance of that warrant by the Commissioner.

No investigation of any kind was attempted, although routine procedures would have done much to resolve the question of petitioner's guilt or innocence. And the affidavit itself was proven to be false, its falsity in part attributable to a misrepresentation by a government agent.

In these circumstances, the very least that can be required of the government is that it make such disclosures as would permit the defense to explore fully the issue of probable cause.

Merely to presume the existence of probable cause through the uncritical acceptance of the agent's conclusions, is to circumvent the issue completely.

We earnestly urge that where *all* of the material information in the affidavit came from confidential informers, once removed and twice removed, whole chains and relays of

them; and where, as here, *not one item* in the affidavit, material or collateral, was based on the affiant's personal knowledge; and where, as here, no slightest effort was made to corroborate the informant, and opportunities for corroboration were ignored; then, there is a failure of probable cause for a search warrant.

B. THE PROVEN FALSITY OF THE APPLICATION FOR THE SEARCH WARRANT REQUIRED THE SUPPRESSION OF THE EVIDENCE THEREBY ACQUIRED.

Lacking the requisite collateral corroboration of their confidential informant, the agents hunted around for another "usually reliable" confidential informant from their handy list of such persons. They were lucky enough to find the very man for the job. Leo Rugendorf, he said, was a fence and was associated with petitioner in the meat business. And petitioner was Leo's brother. (R. 7)

In this prosaic aspect, at least, it was considered possible to corroborate an informant. Toward that end, the affidavit quoted a Chicago policeman as saying that petitioner did indeed manage the Rugendorf Bros. Meat Market. (R. 7)

The agents thereby sought to "corroborate" their informant by a noteworthy investigative feat. They "verified" through yet another faceless informer, the fact that petitioner Sam Rugendorf was the brother of Leo Rugendorf, and quoted a Chicago police officer as authority for the proposition that they were in business together.

Thus, hearsay in the second degree was "corroborated" by falsehood in the second degree. It was proven, conclusively and without contradiction, that petitioner was not

in fact in business with his brother (R. 19-21) and that the police officer had not in fact made any such statement to the F.B.I. Agent (R. 17)

All of the "corroboration" was either legally meaningless, or totally false—false not only in what the informants had said, but equally false in the aspect of what the federal agents represented the informants to have said.

The government has argued in this court that the portions of the affidavit proven to be false "had nothing to do with the unequivocal statement of the informer that he had seen the furs in the basement of petitioner's home." (Brief in Opposition, p. 11).

On the contrary, the misinformation is very highly relevant. It is the only supposed corroboration of the informant's statement. It is the vital "substantial basis for crediting the hearsay" necessary to the issuance of a search warrant on the basis of an informer's statement. *Jones* v. *United States*, 362 U.S. 257, 269, 272, 4 L.Ed. 2d 697, 707, 708.

It follows that since the corroboration did not in fact exist, probable cause did not exist.

Moreover, demonstrated untruthfulness on the part of the officer would seem highly relevant to any determination whether he may properly be the sole judge of the existence of probable cause for a search. Even if it were otherwise proper that a court should slavishly accept the officer's conclusion that probable cause existed, such reliance would seem inappropriate when it is proven that the officer has obtained his search warrant by making a false sworn statement. The philosophy that the truth of the affidavit was immaterial so long as incriminating evidence was in fact

found, was actually adopted by the trial judge, who overruled the motion to suppress, and foreclosed further inquiry, with the following statement:

> "Even if part of the affidavit should be false, the main part of it, the material part, is true, because they actually found the garments there. Bring the jury." (R. 25).

Contrary to all accepted juridical concepts, the trial court justified the search, not on the basis of probable cause, but on the basis of what was found. But a search cannot be justified as lawful merely because the results in the disclosure of incriminating evidence. *United States* v. *Di Re*, 332 U.S. 581, 595. If the rule were otherwise, a petition to suppress could literally never succeed, and the constitutional protection against unlawful search and seizure would be totally meaningless.

But even if this highly questionable philosophy be accepted, the trial court was still in fundamental error. The question presented, even by the government's theory, was not whether there were furs in petitioner's basement. Rather, the issue was whether there was reasonable grounds to believe, at the time the search warrant was issued, that the furs were there, and whether any misconduct on the part of federal agents had generated the information. Determination of the identity of the confidential informant was very highly relevant to the resolution of that question. In view of the demonstrated falsity of the remainder of the affidavit, the defense was entitled, at least, to determine whether the confidential informant of past proven reliability existed. Such an informant was proven not to exist in *United States* v. *Pearce*, 275 F. 2d 318, 7 Cir. 1961. The defense was further entitled to determine whether the confidential informant had acquired

his information through an unlawful means, as in *United States* v. *Coplon*, 185 F.2d 629, 639, 2 Cir., 1950.

We would point out to your Honors that not a syllable nor a punctuation mark in the government's affidavit need have been different if the informant had told the government agents that he himself had placed the furs in petitioner's basement without petitioner's knowledge. The same affidavit also could have been used if the informant had been another agent, who had broken into the petitioner's basement to acquire his information.

We do not say that these things happened. We do not know. But neither can the government now say that they did not happen. The matter is left to conjecture, and conjecture is a poor repository for constitutional rights.

The obvious way to have resolved such doubts was to permit a full hearing in the trial court. But a full hearing could not occur where the government took sanctuary as to the informant's name, and as to all the events surrounding his activities.

In place of clear and explicit constitutional rights, the petitioner has been given a trial which proceeded on the assumption that government agents would not misconduct themselves. This premise is untenable in view of the demonstrated falsity of a portion of the affidavit. But in any event, it is a poor premise for a criminal prosecution, totally unworthy of constitutional government.

As Justice Learned Hand observed:

> "Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens. All governments, democracies as well as autocracies, believe that those they seek

to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism." *United States* v. *Coplon*, 185 F. 2d 629, 638, 2 Cir. 1950.

That the affidavit was here proven in part to be false, is entirely fortuitous, and does not affect the basic principle involved. We do not contend that accused ought be permitted information as to the identity of an informant, only where he can show falsity in some other portion of the affidavit. Lacking information concerning the informant, a defendant will rarely be able to meet this burden. Rather, we urge that a defendant should be permitted such information wherever relevant, in order that evidence thus obtained may be admitted against him only where the affidavit is *not* false, and in order that the affidavit may not be used as a subterfuge for evasion of the constitutional prohibition against unlawful search and seizure.

C. WITHHOLDING THE IDENTITY OF THE INFORMANT SHOULD HAVE RESULTED IN SUPPRESSION OF THE EVIDENCE.

The government has obtained against petitioner punitive action legally possible only if its evidence was obtained with probable cause. At the same time, it has thwarted every effort to determine whether probable cause in fact existed.

We suggest that the government may not properly rely upon a supposed fact as to which it is unwilling that evidence be heard.

"The prosecution necessarily ends any confidential character" attaching to such information. "The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." *United States* v. *Andolschek,* 142 F. 2d 503, 506, 2 Cir., 1944.

The motion to suppress was denied. It was denied because probable cause was found to exist. Probable cause was found to exist because the defendant could not prove that there was no probable cause. The defendant could not so prove because he did not know in what the probable cause was supposed to consist. He did not know because the government refused to tell him.

In short, the court took the agent's word for the fact that there was probable cause for the search.

The legal significance is that the agent was the sole judge of whether probable cause existed.

The judicial function was never performed.

IV.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION.

It has never been expressly decided that one who violates Section 2315 by receiving, concealing, or storing stolen property, must do so knowingly. But if knowledge was an issue in this case, certain it is that there was no shadow of evidence on that issue.

Petitioner came into court with a background of hard and honest work, and a spotless reputation, achieved over a span of 55 years.

The government came into court with a stipulation that furs valued at more than $5,000.00 had been stolen outside Illinois, and with proof that they had been found concealed in petitioner's basement.

This was the government's entire presentation before the jury. And it must be judged in the light of certain highly relevant and uncontested facts. The defendant and his wife were absent from Chicago on vacation for a period of two weeks, beginning about one week after the completion of the theft (R. 30, 39). They left keys to their home, for emergency purposes, with a number of people: their son; petitioner's sister; a neighbor (R. 30, 39). They also left a key with petitioner's brother, Leo (R. 30, 39). And Leo was a "fence" (R. 30).

The day following petitioner's departure, Leo came into the neighborhood. He told a neighbor, Mrs. Lamm, not to worry if she saw lights in petitioner's house, because he, Leo, had a key (R. 28).

An agent and affiant for the government took solemn oath that he had reliable information that the furs had been stolen by criminal asociates of Leo, and that Leo's function was to dispose of goods stolen by the thieves (R. 7, 8).

There is no evidence that petitioner ever saw the furs prior to his arrest. There is no evidence generating so much as an inference that he knew they were in his basement.

The very most that can be said in support of the judgment of conviction, is that the furs were found in a basement closet of a residence partly owned and occupied by petitioner, but to which a number of others also had full access.

This may or may not show *constructive* possession of the furs by the petitioner. But statutory guilt consists in two elements: (1) Possession of stolen goods, (2) with knowledge of their stolen character.

From proof of actual exclusive possession of stolen property, it may be possible to *infer* guilty knowledge. But such an inference is tenable only on a showing of "control, dominion, or exercise of authority over" such property. *Pearson* v. *United States*, 192 F. 2d 681, 693, 6 Cir., 1951.

The "control" required to support guilt is a conscious control (*United States* v. *Wainer*, 170 F. 2d 603, 606, 7 Cir., 1948) and an intent to control (*United States* v. *Curzio*, 170 F. 2d 354, 357, 3 Cir., 1948).

There is no evidence that petitioner ever put a hand on the stolen furs, or ever saw them, or was ever aware of their presence in his home. In these circumstances, his "possession", if such it can be called, was constructive at best. And constructive possession "is incapable of supporting an inference that the constructive possessor knew that the goods had been stolen." *United States* v. *Russo*, 123 F. 2d 420, 422, 3 Cir., 1941.

The Court of Appeals' opinion which we ask your Honors to review, suggests that material fact issues were presented to the jury. The record will not support that assertion. The only evidentiary conflict was whether Leo had returned the keys when petitioner returned from his vacation. The government urges that the jury resolved this issue against petitioner, and argues that it is illogical to believe:

> " . . . that Leo would have placed the furs in the basement and then given away his only means of taking the furs out of the basement by returning the key to defendant . . . " (Government brief in Court of Appeals, p. 7)

The Court of Appeals has elevated this argument to the dignity of plurality, by its reference to "stubborn *facts* plainly pointing to [petitioner's] guilt."

The patent impossibility of copying a residence key at any price less than 25¢, imparts to that argument such cogency as your Honors may deem it to possess.

Not only is it far more probable that Leo is the offender; it is the simple, if absurd, fact that the case against petitioner's wife is much stronger than the case against petitioner. Petitioner's wife managed the home, and lived there throughout the day (R. 32). Petitioner merely slept there, on the normal working day (R. 39).

Assuredly, petitioner's wife is no more guilty than petitioner. The real offender was almost certainly Leo, or some other person known to the nameless informant whose identity was guarded from petitioner's inquiries. But a much stronger case, although still inadequate to support conviction, could have been made against petitioner's wife, than was made against petitioner.

The outcome of this litigation to this time cannot be pleasant to petitioner's wife. But she may at least take solace in the fortunate circumstance that she was not born as Leo's sister.

* * * *

If Section 2315 requires that the concealment or storage of stolen goods must be knowingly done in order to be criminal—and this is the obvious intent of the Statute—this would be an exceptionally felicitous occasion, from Petitioner's standpoint, for the clarification of that principle.

If Section 2315 does not so require, it would likewise be helpful if that fact were made clear, in order that the citizenry may be alerted to the necessity of periodic and

systematic inspections by them of their residences, business quarters and vehicles to assure that all is in readiness if the police should come.

And if being the brother of a suspected criminal, entitles the government to use one as a pawn in the "war against crime," it is high time we all stopped pretending to the contrary, and abandoned our time-wasting academic discussions concerning individual rights and dignity.

CONCLUSION

For the reasons herein expressed, Petitioner prays that his conviction be reversed by reason of the inadequacy of the evidence to support conviction.

In the alternative, Petitioner prays that his conviction be reversed by reason of the denial to him of his right to be informed concerning the confidential informants referred to in the government's affidavit.

Respectfully submitted,

MELVIN B. LEWIS,
JULIUS LUCIUS ECHELES,
FRANK W. OLIVER,
Attorneys for Petitioner.

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